IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. ....

AL N. FOX and MAX FOX,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Courts Below.

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

II.

Jurisdiction.

A.

The Court is respectfully referred to Subdivision II of the petition (*supra,* p. 6) on the question of Jurisdiction. Said Subdivision II is herewith adopted and made a part of this brief.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-3), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

A. The Circuit Court erred in sustaining a conviction because it was improper to combine under one single count indictment and offer proof of four different conspiracies, all of which were different as to content, two of which were separate as to personnel, two of which thoroughly failed of proof, and one of which even if proved, would constitute no crime.

B. The Circuit Court erred in sustaining the conviction because there was harmful and fatal variance between allegations and proof because of what has directly hereinbefore been set forth and because of the following additional factors:

1. The jury may have confused the issues.

2. The jury may have applied all the evidence indiscriminately and cumulatively against each petitioner whereas substantial parts thereof related to conspiracies to which these petitioners were not a party, and substantial portions of said evidence related to a conspiracy which as a matter of law constituted no crime.

C. The Circuit Court erred in sustaining the conviction because the Judge's colloquial charge was obscure and unenlightening to a point where, because of all the foregoing, it prevented the jury from intelligently considering the case.

D. The Circuit Court erred in sustaining the conviction because the trial was unfair by reason of the matter directly hereinbefore set forth under C as well as on the following additional grounds: the trial judge plainly exhibited bias towards the government and against the defendants. He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude toward defendants' counsel.

E. The Circuit Court erred in sustaining the conviction because the evidence was not sufficient to connect the petitioners with or to sustain proof of a conspiracy.

Statutes and Regulations Involved.

The Statutes and Regulations involved are set forth in the appendix.

Argument.

A.

The jury's verdict as against the Fox petitioners can stand, if at all, only on the theory that they conspired to sell lead and opium wash for non-medicinal purposes. The Government's case as per the opening of the prosecutor (R. 18-26), contemplated a three-fold conspiracy to synthesize opium, to extract it and to divert it. The Circuit Court of Appeals has decided that the synthetic phase was abandoned, and anyway would constitute no crime, and that the diversion phase utterly failed of proof. The Circuit Court of Appeals has also decided as per its opinion that under the evidence, the petitioners had no part in the synthetic phase and the extraction phase, that the diversion phase of the conspiracy failed of proof and that there was a variance between the allegations and proof. The theory on which the verdict now rests as to these petitioners was not ap-

parent to the prosecutor or to the trial judge. We find no mention of it in the opening statement, throughout the case or in the trial judges charge. The probability of confusion must be apparent even as an abstract probability when we consider the number of defendants involved, the length of the trial, the number of conspiracies, their differences as to content and personnel and the admittedly colloquial, unenlightening and obscure charge of the judge. We pass from the abstract to the reality when we consider that the only theory on which the conviction now rests as to these petitioners was not advanced at the trial by judge or prosecutor and was only raised for the first time on appeal to the Circuit Court. If neither prosecutor nor trial judge perceive this theory how can we possibly suppose that the jury, amid all the confusion, came to their verdict on this theory? The question answers itself.

The joinder of crimes has frequently been passed upon. Many cases exist on the subject. In some the joinder has been sustained and in others condemned. At best it has been said to be harmless error. The dividing line obviously depends upon degree. At the one extreme we have the case of *McElroy* v. *U. S.*, 164 U. S. 76, where the conviction was reversed. At the other extreme we have the case of *U. S.* v. *Lotsch*, 102 Fed. (2d) 35 where the conviction was sustained. It is really a matter of degree. In the following cases joinder has been held fatal:— *Marcante* v. *U. S.*, 49 Fed. (2d) 156; *U. S.* v. *Wills*, 36 Fed. (2d) 855; *Tellman* v. *U. S.*, 67 Fed. (2d) 716; *U. S.* v. *Groves*, 122 Fed. (2d) 87; *U. S.* v. *Silva*, 109 Fed. (2d) 531; *Wyatt* v. *U. S.*, 23 Fed. (2d) 791; *Terry* v. *U. S.*, 7 Fed. (2d) 28; *U. S.* v. *McConnell*, 285 Fed. 164.

It is submitted that the case at bar more clearly calls for condemnation of the joinder and variance and for consequent reversal than any of the decided cases. As the dissenting Judge of the Circuit Court of Appeals in the

case at bar has said "The ruling here is the furthest north of the *McElroy* case to be found in the books."

B.

The principle that the seller and buyer cannot be indicted for conspiracy to use the article of sale illegally unless the seller proposes to join and has a stake in the subsequent illegal use is well settled. See *Falcone* v. *U. S.*, 311 U. S. 205; *U. S.* v. *Peoni*, 100 Fed. (2d) 401; *U. S.* v. *Koch*, 113 Fed. (2d) 982; *Young* v. *U. S.*, 48 Fed. (2d) 26; *U. S.* v. *Dickerson*, 18 Fed. (2d) 887; *U. S.* v. *Pandolfi*, 110 Fed. (2d) 113. Furthermore if the sale is a crime it involves the mutual cooperation of two persons and if these two in fact have committed the crime they may not be convicted of a conspiracy to commit it. *U. S.* v. *Dietrich*, 126 Fed. 664; *U. S.* v. *N. Y. Central & H. R. R. Co.*, 146 Fed. 298; *U. S.* v. *Sager*, 49 Fed. (2d) 725, 727, 728; *U. S.* v. *Katz*, 271 U. S. 354, 355; *Gebardi* v. *U. S.*, 287 U. S. 112, 122; *U. S.* v. *Zeuli* (C. C. A. 2nd Circuit, decided August 2, 1943, presently unreported).

The leading case no doubt is the *Falcone* case. The Circuit Court of Appeals in the case at bar, appears to distinguish this as to the "druggists". The Fox petitioners concededly were not druggists, they were merely jobbers, namely, commission agents selling for the defendant Londoner, to the druggists who in turn sold to Liss. The distinction relied on by the Circuit Court of Appeals was that here, the conspiracy was to evade the statute and regulations forbidding sales unless made for medicinal purposes, unless made to consumers or registered dealers, and unless recorded. The Circuit Court of Appeals in the case at bar has said "There may be doubt whether the evidence proved that the conspiracy contemplated that the sales should not be recorded." The government's own witness Gitlitz (a member of the firm of Recro Drug Co. through which the Fox's operated) affirmatively stated that books of records

were kept (B. 447). Two of them in fact were in evidence (R. 321, 322). The other could not be found. At best there was simply the non-production of a record admittedly kept. Even the non-production was satisfactorily accounted for. There was a Marshals sale and in the confusion incident thereto the record was lost (R. 431, 448, 450, 451-454). No druggist was shown not to be registered although all the druggists as government witnesses took the stand and testified (R. 304-390). The manufacturer, Londoner, kept proper records of sale, see opinion of the Circuit Court of Appeals, page 907 of the record. The jobbers, his selling agents, the Fox petitioners were also registered (R. 447, 431). Liss was the only consumer. We have, therefore, simply a conspiracy to sell for non-medicinal purposes to a non-consumer to wit Liss. The Fox petitioners, the Circuit Court of Appeals has said, did not even know Liss and had no transactions with him. While the druggists may have sold to Liss and have conspired to violate statutes and regulations certainly the Foxes cannot be included in the conspiracy because they were no party to the sale. Title had passed from them before the druggists illegally resold. See *U. S.* v. *Byers*, 73 Fed. (2d) 419.

The sale to the druggists by and of itself was not criminal. If we join the Foxes and Londoner on account of the illegality of the resale we are in effect holding that if it is not a crime to sell an article but is a crime to resell it, nevertheless the seller is criminally responsible with the buyer because of his resale. Although it was illegal to make illicit alcohol, in the *Falcone* case the Court held that the seller of the sugar with which the illicit alcohol was manufactured could not be joined in a conspiracy with the manufacturer. Simply because it is illegal for a druggist to sell lead and opium wash to a consumer for a non-medicinal purpose how can the party through whom a legal sale to the druggist is made be joined in a conspiracy with

the druggist to resell it? Obviously we cannot charge the Foxes with guilty knowledge because of non-registry on their part or on the part of the purchasers who resold since such non-registry was not the fact nor can we so charge them because of not keeping records. All that remains therefore is quantity. This of itself has been held insufficient, see case of *Eckert* v. *U. S.*, 7 Fed. (2d) 257 and *Falcone* v. *U. S.* (*supra*).

The Circuit Court has termed the deals in which the sales were made from the Foxes to the druggists as "bizarre". There was merely a sales promotional scheme initiated by Londoner's concern whereby free goods were given with each sale of various items which sale included lead and opium wash (R. 304-390, 444-445). True the sales were beyond the normal requirements of the purchasers and they were told that returns could be made and returns were in fact made, but this was no concern of the Fox petitioners who were merely the salesman and not the sellers. The sales have also been termed "sham" by the Circuit Court. Of this there is absolutely no proof. All we have therefore is quantity. If because of quantity we can predicate guilty knowledge then perhaps we could adopt the terms of "sham" and "bizarre". This, however, is simply arguing in a circle. Even, however, though there is knowledge the *Falcone* case and other cases hereinbefore cited held in effect that knowledge is not enough. There must be participation in the end result.

C.

This was indeed a complex case, involving as it did a joinder of so many different conspiracies differing as to content as well as to personnel. In view of this it is submitted that the judge's charge (R. 779-801) colloquial, unenlightening and obscure as it was, was hopelessly inadequate to enable the jury, by a process of intelligent

discrimination, to arrive at a correct result. That a charge of this character constitutes reversable error and renders the trial unfair has frequently been held. See *People* v. *Odell,* 230 N. Y. 481, 487-488; *Kreiner* v. *U. S.,* 11 Fed. (2d) 722, 731; *Owen* v. *Owen,* 22 Iowa 270; *U. S.* v. *Quick,* 128 Fed. (2d) 832, 835.

It is appreciated that these appellants did not take full advantage of the inadequacy of the charge by making the proper requests and taking the proper exceptions. It is respectfully submitted however, that we may nevertheless now press the matter under Title 28, United States Code, Section 391 which provides as follows:

> "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

It has been held so consistently that points not raised upon a trial may be considered on appeal where injustice might otherwise result, that only a few authorities will be cited. *De Jianne* v. *U. S.,* 282 Fed. 737; *Moore* v. *U. S.,* 224 Fed. 95; *Keliher* v. *U. S.,* 193 Fed. 8.

In addition to the foregoing as heretofore pointed out the Judge's attitude throughout the trial was such that the same was unfair. In this connection we cite the following cases. *Adler* v. *U. S.,* 182 Fed. 464, 473, 472; *Frantz* v. *U. S.,* 62 Fed. (2d) 737. We also refer the Court to the discussion and Record pages hereinbefore set forth at page 5.

In connection with Subdivision C we also rely on many of the cases cited in the dissenting opinion of Judge FRANK and we cite therefrom the following: *Mattox* v. *U. S.*, 146 U. S. 840; *Wilmington Mining* v. *Fulton*, 205 U. S. 60; *Schilling* v. *Delaware & H. R. Corp.*, 114 Fed. (2d) 69; *Christian* v. *B. M. R. R.*, 109 Fed. (2d) 103, 105; *Wiborg* v. *U. S.*, 163 U. S. 632, 658; *U. S.* v. *Atkinson*, 297 U. S. 157, 160; *Brasfield* v. *U. S.*, 272, U. S. 448; *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Crawford* v. *U. S.* 212 U. S. 183, 194; *Van Gordor* v. *U. S.*, 21 Fed. (2d) 939, 942; *Meadows* v. *U. S.*, 82 Fed. (2d) 881, 884. *In re Barnett*, 124 Fed. (2d) 1005; *U. S.* v. *St. Pierre*, 132 Fed. (2d) 837, 849; *Bruno* v. *U. S.*, 308 U. S. 287, 294; *Fort Dodge Hotel Co.* v. *Bartelt*, 119 Fed. (2d) 253, 259; *McCandless* v. *U. S.*, 298 U. S. 342, 347, 348.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

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